No. 14222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statute

Textbook

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I.

SUMMATION OF FACT.

It is clear from the statement of facts of both appellant and appellees that the facts are of little importance.

The statement of appellant regarding the materiality or admissibility of the evidence is made in line with the Stipulation of Fact which was on the basis that either party had a right to question materiality of any portion of the evidence, and the doubtful materiality and little weight of the evidence regarding the clearing of the ditches every four years [Tr. Rec. p. 39] is clear in the determination of the issues in this case.

One further matter of fact should be clarified. Appellees have questioned, at pages 9 and 10 of their brief, the right and power of the corporation to create the liens or the voluntary aspects of any payment by appellant. A reading of the entire record to date clearly shows that at no stage of the proceedings was there any question of the right or power of the corporations to levy the assessment. The entire additional stipulation of fact [Tr. Rec. pp. 35-40] clearly shows an acceptance on the part of both appellant and appellees of the power of these corporations to levy the assessments, for in fact it was agreed that the payments were made to free the stock of the assessments levied. [Tr. Rec. p. 38.]

The parties have by stipulation agreed that a lien was created by reason of the assessment. [See items 9, 10 and 11 of Additional Stipulation of Fact, Tr. Rec. pp. 37-38.] In addition thereto, it should be noted that the parties also stipulated that like assessments had been made at irregular intervals in the past. [Tr. Rec. p. 39.] In these stipulations it can hardly be held that the parties did not have in mind the right and power of the corporations to levy such assessments.

No further reference will be made in this brief to that portion of appellees' brief labeled (4) and which belabors the right or power of the corporations to assess the stock.

II.

ARGUMENT.

1. The Assessments Are Included Within the Terms of the Contract.

As pointed out in appellant's opening brief (pp. 8-11), there are two provisions of the contract pertaining to indebtedness and expense, and it is clear from a reading of the entire instrument that the parties intended to include not some of the expenditures or some of the indebtedness, but rather they intended to include all of them. The parties were most meticulous in stating that the expenses and taxes and insurance were to be "prorated" as of the close of escrow. [Tr. Rec. p. 24.]

The appellees argue that at best, as expenses, a proration should take effect over a base period of four years. This argument wholly fails to appreciate the fact of proration. Proration unless it is made by agreement is never on an indefinite period.

The four years arrived at in this instance was pursuant to the stipulation of fact, which stipulation further points out that the assessments were made at irregular intervals, but that for the purpose of clearing ditches it had been done from three to five years apart. It is therefore manifestly impossible to prorate these expenses on any basis other than a 100% at the time the expenses fall due for the purposes of an escrow.

In order to show that such prorations are possible, the appellees cite depreciation for tax deductions, and the fact

that accountants prorate such expenses frequently. This is, of course, no answer in the sale of real property. There are many places in the tax law where estimates of the life of a building are permissible, yet this does not permit of an accurate proration except for the very purpose of taxation, certainly not for the basis of proration as the term is used in escrows.

Appellees further state that as expenses the assessments were not to be covered for the reason they did not become expenses until paid, which was after the close of escrow. Again, appellees completely miss the use of the term. The expense was due and payable at the instant the lien was created. The dates of May 15 which followed the close of the escrow were not "due dates" but "past due dates." Upon this date if the payment had not been made, arose the right of the corporations to sell the stock to satisfy the lien. It is not synonymous with being due.

In this connection it may be likened to taxes on real property, where in California taxes are payable from July 1 to June 30, yet payments on account thereof are not paid even on the first installment until the month of December. On proration of taxes in September, it cannot be argued that there is no tax due by the seller as the payment does not have to be made until December. He is still liable for that proration of the taxes as preceded the date of sale commencing July 1. Therefore to state that the assessments were not expenses because not paid, is a completely fallicious argument.

2. Under California Law Assessments Levied After an Escrow Is Opened Do Not Fall Upon the Purchaser.

Appellees under Point (3), page 7 of their brief cite as being California law that "upon performance by the parties of the terms of the escrow, the title passes as of the date the escrow was opened." This is not the law of the State of California. Even though the brief cites cases, it should be noted that each of the cases cited relies upon the exceptions to the general rule.

The general rule is, where a deed is placed in escrow, that a conveyance takes effect upon the performance of the prescribed conditions and the delivery *by* the depository. (Civ. Code, Sec. 1057.)

It has likewise been held that upon performance of all the conditions of the escrow by the grantee, title will be deemed to have passed, even though the depository does not in fact make the delivery. (*Hagge v. Drew,* 27 Cal. 2d 368.) Such is not our case, although at pages 8 and 9, appellees indicate it is. There is nothing in this record which shows that the grantee appellant had any act to perform toward the passage of this title. This was an exchange agreement. There was no question of the appellant having done otherwise than meet the terms of the escrow, and later it was the act of the appellees which was to close the escrow. Certainly no title passes until the property is in a condition to have title thereto passed.

The clearest expression of the true rule, the doctrine of relation back can be found in *Blumenthal v. Liebman,* 109 Cal. App. 2d 374-380, wherein it is stated (380):

> "The doctrine of relation back is recognized as an exception to the general rule, and only when the circumstances are appropriate to its application. In Miller & Lux, Inc. v. Sparkman, 128 Cal. App. 449 (17 P. 2d 772), the 'agreement entered into between the parties' showed it was their intention that the buyer, as a part of the purchase price, pay all taxes accruing after the date of execution of the instrument. Accordingly, said the court 'to effect the intention and to do equity the passing of title under the deed will be held to relate back and to take effect as and of the date of the constructive or conditional delivery,' the date the deed was placed in escrow. (P. 454; see, also, discussion of other types of circumstances in which the doctrine applies, at pp. 454-457.) We have found in the instant case no basis for applying the doctrine of relation back, in the face of the judgment rendered in the former action."

The general basic rule is illustrated in the annotator's note in A. L. R. reading as follows:

> "The general principle is well settled that upon the final delivery of an escrow instrument by the depository, until the performance of the conditions of the escrow agreement, the instrument will be treated as relating back to and taking effect at the time of its original deposit in escrow, *and a resort to this fiction is necessary to give the deed effect, to prevent injustice or to effectuate the intention of the parties.*" (Emphasis added; 117 *A. L. R.* 69, 70.)

It has already been pointed out in appellant's opening brief (pp. 6, 7) that resort to the fiction in this instance is not necessary, and will create an injustice to do so.

3. The Assessments Are the Responsibility of the Owner of the Stock.

Both appellant and appellees are agreed as to this point. Our differences lie only in two features: one, who is the owner and two, when were the assessments due. (See Appellees' Br. pp. 4 and 5, and Appellant's Op. Br. p 8.)

In connection with who is the owner, it is clear that the appellees are the owners, unless the doctrine of relation back is used, and it has been heretofore illustrated that this doctrine is not applicable to the existing facts. Therefore appellees were the owners of the stock up to the close of escrow. The assessments having been levied prior to the close of escrow, it is the position of appellant that the responsibility for the payment falls upon the appellees, as the payment is merely the administrative factor after the assessments became due.

In relation to the date of May 15, this brief has previously indicated that this is a past due date and not a due date. It is therefore clear that full responsibility for the assessments must fall upon the appellees.

Conclusion.

It is respectfully submitted that court below erred in its conclusions by a misapplication of the law to the stipulated fact and that therefore the decision of the District Court must be reversed.

Respectfully submitted,

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